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No. 85-1291

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JOEL LEVINE, STANLEY I. GREENBERG
AND RICHARD MILLER,
Petitioners,

VS.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a restraining order directed to a defendant's attorneys in a federal criminal prosecution also restricts the defendant's First Amendment right of free speech? Whether an individual looses certain first A rights by virtue of being charged with a criminal offense?

2. Whether the public's interest in the "integrity of the judicial process" and the appearance of fairness is a sufficiently compelling interest to justify prior restraints on the speech of defense counsel?

3. Whether defense counsel's comments to the press on the eve of trial pose a sufficiently serious and imminent threat to the fairness of the trial to justify prior restraint of free speech, where the trial district has a population of 12 million noted for it heterogeneity, no contention is made that defense counsel's statements to the press refered to any inadmissible evidence, and the threat to the trial's fairness is recognized to be speculative at best?

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as amicus curiae in support of petitioners, with the consent of petitioners and real party in interest, pursuant to Supreme Court Rule

36.4.[1]

NACDL is an organization with a membership of over 5,000 lawyers and law professors from all 50 states dedicated to the protection of the rights of criminal defendants and their lawyers and the promotion of fairness in the administration of criminal justice. NACDL annually files more than 100 amicus briefs in federal and states courts including this Court.

NACDL is profoundly concerned that defendants' rights to free speech, fair and public trials, and the presumption of innocence are accorded due weight when courts contemplate imposition or review of "gag" orders directed to their attorneys. If allowed to stand, the

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[1] Petitioner's counsel and the Office of the Solicitor General have both given their oral consent to the filing of this brief. Copies of their letters of consent will be submitted to the Clerk of the Court as soon as received.

opinion of the Ninth Circuit would significantly undermine those rights and create a "chilling effect on lawyers called upon to represent unpopular defendants in high visibility cases." (Justice Norris, dissenting from the Ninth Circuit's denial of the petition for rehearing, at A-115.)

NACDL fully supports the arguments made by petitioners. We submit this brief in order to highlight the rights of defendants and their lawyers implicated by the Ninth Circuit's decision below.

STATEMENT OF THE CASE

The instant case presents this Court with its first opportunity squarely to address the balance to be struck among competing constitutional rights implicated by restraining orders directed to defense attorneys in criminal prosecutions. The

Ninth Circuit balanced those interests by holding that a pretrial restraint on counsel's speech may be sustained upon a speculative finding that, in the absence of such restraint, publicity during trial would pose a serious and imminent threat to the fairness of the trial or to the integrity of the judicial process, even in the absence of specific findings that the measure would be effective and that alternatives less onerous to first amendment rights would be ineffective. In so holding, the Ninth Circuit concluded that the order did not implicate rights of petitioner Miller (defendant below), and that petitioners lacked standing to assert the right of access to information concerning important government processes.

The Seventh Circuit (in Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970), the only Circuit other than the Ninth to

confront the issue in the same posture herein presented[2] reached an opposite holding, giving rise to a clear conflict between the circuits. Moreover, while invoking this Court's opinion in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), the Ninth Circuit so applied it as to reach a result at odds with both its letter and spirit.

If the decision of the Ninth Circuit below is permitted to stand, the effect would be to afford the courts, and derivitively the government, virtually unfettered discretion to silence individu-

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[2] In re Halkin, 598 F.2d 176 (D.C. Cir. 1979), noted by the Ninth Circuit (at A-53), concerned a restraint on attorney comments regarding information obtained pursuant to court-ordered discovery. In Seattle Times Co. v. Rhinehart, __ U.S. __, 81 L.Ed.2d 17 (1985), the Court stressed the significance of that distinction in holding that restraints on such comments did "not raise the same spectre of government censorship that such control might suggest in other situations." (Id. at 26-27.)

als accused of crimes in highly publicized cases. Additionally, the decision would strengthen the courts' and government's abiltiy to manipulate press coverage of, and public access to, information regarding criminal prosecutions. In the instant case, the government initally limited the public's and Miller's access to its evidence by proceeding by indictment only. Then, when the grand jury's preliminary examination was complete, the government held a series of press conferences to announce the issuance of an indictment. The burst of publicity could hardly fail to compromise Miller's right to the presumption of innocence particularly in light of the participation of high-ranking government officials at the press conferences.

Miller's counsel (and co-petitioners herein) made an effort to counter the

prejudicial publicity by responding to press questions. When the government dismissed four counts, surely an event of importance equal to the initial issuance of the indictment, Miller's attorneys took the opportunity to outline their version of the case and to note the significance of the government's dismissal.

The government then obtained the order, challenged by the instant petition, restraining counsel from making any further comments to the press. The government successfully overrode Miller's Fifth and Sixth Amendment rights to a fair trial, a public trial, and the presumption and appearance of innocence, his First Amendment right to protest governmental overreaching, and press and public's First Amendment right of access to imformation of public concern by invoking vague notions of "judicial integrity" and

"appearance of fairness". Whereas neither the trial nor appellate court questioned the government's standing to raise the public's interest in those values, petitioners were not permitted to assert the First Amendment rights of the press and public.

The government's success in limiting publication of information in the instant case is matched by its success in publicizing information of prosecutions over defense objection in other cases. When the government desires publicity, it proceeds by information. Defendants' efforts to close preliminary and other pretrial hearings increasingly are being rebuffed.[3] Measures such as change of

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[3] Of the four circuits that have addressed the issue of whether the public's constitutional right of access extends to pretrial hearings, all four have found that it does. Application fo the Herald Co., 734 F.2d 93 (2d Cir. 1984); United (Continued)

venue, continuance, extensive jury voir dire, instructions, and sequestration, discounted by the Ninth Circuit below as ineffective to guard against threats to "judicial integrity", are considered more than adequate to protect defendants' rights to a fair trial. See, e.g., Gannett v. DePasquale, 443 U.S. 368 (1979)

REASONS FOR GRANTING THE WRIT

I.

SUBSTANTIAL FIRST AMENDMENT RIGHTS WERE IMPLICATED BY THE RESTRAINING ORDER UPHELD BY THE NINTH CIRCUIT.

A. The Ninth Circuit's conclusion that a criminal defendant's free speech rights are not implicated by a restraining order directed to his attorney is erroneous and threatens fundamental free speech rights.

The Ninth Circuit determined that

States v. Chagra, 701 F.2d 354 (5th Cir. 1983); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982); United States v. Criden, 675 F.2d 550 (3d Cir. 1982). The issue is now pending before this Court in Press Enterprise Co. v. Superior Court, No. 84-1560 (October Term, 1985.)

the challenged restraining order directed against Miller's attorneys did not implicate Miller's first Amendment rights. The Court reasoned that Miller was able to communicate his side of the case to the media by testifying at the trial of his co-defendants pursuant to a grant of limited immunity. (A-38, n. 1.) In addition, he could issue statements to the media through his family members. Moreover, Miller's attorneys were only precluded from making extrajudicial statements; thus they remained "free to present Miller's case in open court." (Id.)

Those conclusions represent a distressing disregard of the rights of criminal defendants as well as of the proper function of the courts.

First, to suggest that a defendant is not disadvantaged by a gag order directed to his attorneys since he may

personally communicate with the media through press releases or in court wholly fails to take account of the defendant's right against self-incrimination. The Ninth Circuit's "solution" would impermissibly condititon the exercise of one fundamental right -- the right of free speech -- on relinquishment of a second -- the right not to incriminate oneself. See Perry v. Sindermann, 408 U.S. 593, 597 (1972) (the government "may not deny a benefit to a person on a basis that infringes a constitutionally protected interest--especially, his interest in freedom of speech").

Second, the Circuit's suggestions reflect a disregard for the proper function of court hearings. It would hardly be appropriate for a defense counsel to attempt to use the forum of the courtroom to educate the public about his client's

case. Even more improper would be petitioner Miller's use of the occasion of testifying at a co-defendant's trial to communicate his knowledge and opinion of circumstances relevant to his own innocence.

Third, the court's suggestions depend, for any effectiveness, on the press being in the right courtroom at the right time. Yet, common experience shows that most newspapers are not likely to cover a trial from start to finish, and those that are limited to only partial coverage are most likely to attend at the beginning of a trial. There is no assurance that any press would be present when defense counsel might begin argument or cross-examination.

Fourth, the court's alternatives utterly deprive the defendant of any radio or TV coverage, since the local rules of

the district court exclude TV cameras and radio microphones from the courtroom. (U.S. District Court, Central District, Rule 28.1)

Fifth, quite apart from self-incrimination concerns, gagging a defendant's attorney places substantial content restrictions on a defendant's speech. In most cases, a defendant's lawyer will be his most effective spokesperson. The lawyer is likely to have greater credibility than his client, and be better able to communicate clearly the issues of greatest interest and significance to the public.[4]

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[4] "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. Often their clients will not be as articulate or informed." Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).
(Continued)

B. The Ninth Circuit's conclusion that defense attorneys have less substantial free speech rights than other trial participants conflicts with prior decisions of this Court.

The Ninth Circuit concluded that "it is appropriate to impose greater restrictions on the free speech rights of trial participants than on the rights of non-participants ... [and that] the case for restraints on trial participants is especially strong with respect to attorneys." (A-48, citing Sheppard v. Maxwell, 384 U.S. 333, 360-363 (1966) and Nebraska Press Association, 427 U.S. at 564. See also A-43, citing In re Halkin, 598 F.2d 176, 195, & n. 44 (D.C.Cir. 1979).) Even assuming the validity of the first part of that proposition, the second

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As Lawrence Tribe has noted, "To the extent that criminal defendants rely on counsel to represent their interests both in and out of court, it would be problematic to impose greater restrictions on counsel than on the accused." Tribe, American Constitutional Law (1978), p.628.

part is dubious at best, particularly where as here the restraints were directed to attorneys for a criminal defendant.[5]

The relevant inquiry is not the status of the speaker but the nature of the speech sought to be restrained and the timeliness of the expression. Halkin, supra, 598 F.2d at 191, and cases cited thereat. An order restraining political speech or information of public concern implicates more substantial interests than an order restraining commercial speech. An order restraining highly newsworthy

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[5] In Sheppard v. Maxwell, supra, 384 U.S. 333, this Court particularly critized the trial judge for his failure to take any action to restrain the Coroner, police officers, and other prosecution witnesses (id. at 361) and admonished that "trial courts must take strong measures to ensure that the balance is never weighed against the accused." (Id. at 362.)

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), this Court expressly stated that it did not reach the question of whether restraints on lawyers' speech infringed First Amendment rights (at 565, n. 8).

information for a long period of time is more drastic than a temporary restraint of materials having constant but not topical interest. "The damage [due to a prior restraint] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." Nebraska Press, supra, 427 U.S. at 559.

The speech of criminal defendants and their attorneys generally merits particular protection because of the importance of such speech in protecting fundamental interests of the defendant and the public. Consideration of the above factors strongly argues for the conclusion that the restraining order here at issue implicated substantial First Amendment and other interests.

Much of the information that the challenged order restrained -- including

comments on the absence of evidence, and the strengths or weaknesses of the case of either party (see A-69) -- was of considerable public significance. The comments of which the district court particularly complained drew critical attention to the manner in which petitioner Miller's prosecution was handled by the Justice Department, the United States Attorney's Office, and the FBI. Information about criminal prosecutions is of substantial societal concern; information "about police misconduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it" merits particular protection. Gannett Co. v. DePasquale, 443 U.S. 368, 435 (1979). See also United States v. Mandel, 408 F.Supp. 673, 678 (D.Md. 1975)

A defendant's Sixth Amendment right to a public trial is premised on the

assumption that public scrutiny benefits both fairness and the appearance of fairness. This Court has recognized that, "public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982). The press's oversight function "can be severely impaired ... if those who are most knowledgeable about injustices are silenced at the very moment at which they have the greatest incentive to protest." Freedman & Starwood, "Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 613 (1977). To the extent that attorney statements to the media can clarify and highlight certain in-court

events those statements are significant in drawing press attention to potential threats to the integrity of the fact-finding process.

Miller has a substantial First and Fifth Amendment interest in speech regarding his "character, credibility, or reputation" (proscribed at A-69) because such speech was the only way to safeguard his rights to a presumption of innocence and to protect his reputation in the face of prosecution-generated publicity concerning the charges against him.[6]

Moreover, the restraint was for a

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[6] The Seventh Circuit has commented relevantly: While we agree '[i]t is fundamental to our system of contitutional democracy that issues of law and fact in a criminal proceeding be resolved in the courts, and not in the news media nor in the streets,' we believe equally fundamental to our system is the right of all citizens, even if they be criminal defendants, to exercise their first amendment rights." Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (per curiam).

substantial period of time. As of the date that the petition was filed in this case (January 1986) the restraining order had been in place for nearly a year. Timeliness is essential in the reporting of news about criminal prosecutions because "it is only when the litigation is pending and currect news that the public's attention can be commanded." Chicago Council of Lawyers, supra, 522 F.2d at 250.

As the Halkin court noted, "the Supreme Court has never squarely addressed the issue ... [of whether] orders restricting comments by parties and attorneys are a less drastic alternative to gagging the press." (598 F.2d at 195, n. 44) Arguably, prior restraints on defense attorneys may be as drastic as certain restraints on the press. This case presents this Court with the opportunity to squarely address these

issues.

C. The Ninth Circuit disregarded prior decisions of this Court in concluding that petitioners lacked standing to raise the public's right of access to information about important governmental processes and accordingly failed to give proper deference to that right.

The Ninth Circuit acknowledged that "By effectively denying the media access to the litigants, the district court's order raises an issue under the first amendment by impairing the media's ability to gather news." (A-44) The Ninth Circuit declined to consider the interest in news gathering, however, because it concluded that petitioners lacked standing to raise the rights of the media. Petitioners cite compelling authority calling into doubt the correctness of that conclusion. (See Petition, pp. 56-63.)

Even assuming, for the sake of argument, that petitioners had no standing to raise the interests of the media, they

surely had standing to raise the public's correlative first amendment right of access to information about important government functions. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582 (Stevens, J., concurring.) In Waller v. Georgia, 457 U.S. 39 (1984) this Court indicated that it would have reached the issue of the public's access interest had it not upheld the defendant's right to an open suppression hearing under the Sixth Amendment. Id., n. 6. The Court made no mention of any standing problem. Similarly, the Court recognized that the accused shares with the public the right of open access to court proceedings. Press Enterprise Co. v. Superior Court, 464 U.S. 501, 78 L.Ed. 629, 641 (1984).[7]

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[7] "For present purposes, how we allocate the 'right' to openness as between the accused and the public, or whether we view it as a component (Continued)

The public's interest in access to information is both substantial and distinct from the media's access interest.

> "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibt government from limiting the stock of information from which members of the public may draw. Richmond Newspapers v. Virginia, 448 U.S.555, 575-576 (opn. by Burger, C.J., joined in by White and Stevens, JJ.[8]

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intherent in the system benefitting both, is not crucial." 78 L.E.d2d at 637. See also Blackmun, J., concurring, id. at p. 641, noting that jurors' privacy rights are adequately represented by defendants because they share an interest in protecting those rights.

[8] See also Richmond Newspapers at 587-588 (Brennan and Marshall, JJ., conc.):

> Implicit in the[] structural role [played by] ... the First Amendement ... in securing and fostering our republican form of government ... is not only 'the principle that debate of public issues should be uninhibited, robust, and wide-open,' New York Times v. Sullivan, 376 U.S. 254, 270 (1964), but the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed."

II.

IN ORDER TO JUSTIFY A PRIOR RESTRAINT OF SIGNIFICANT FIRST AMENDMENT RIGHTS, IT MUST BE SHOWN BY CONCRETE EVIDENCE THAT THE THREAT TO A FAIR TRIAL IS SERIOUS AND IMMINENT, THAT THE PRIOR RESTRAINT WILL BE EFFECTIVE, AND THAT OTHER LESS DRASTIC MEASURES WOULD BE INEFFECTIVE; SPECULATION WILL NOT SUFFICE.

The Ninth Circuit concluded that the district court's findings were adequate to support the prior restraint despite the fact that the district court conceded that "the extent of ... publicity in [sic] its prejudicial potential is of necessity speculative ... ." (A-60.) The court justified approval of the prior restraint solely on the following grounds: (1) "it is apparent that this case has received widespread publicity" (A-64); (2) "[t]he district court found that the level of publicity would increase as the trial approached" (id.)[9]; (3) "even if an

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[9] In fact, the district court made no such (Continued)

impartial jury could be selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences" (id. at A-63); (4) "the circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system" (id.); and (5) "the district court properly found that its order would be effective" (A-65-66).

The Ninth Circuit's perfunctory examination contrasts starkly with the careful analysis performed by this Court in Nebraska Press, and "violates both the spirit and letter of that opinion." (A- , opn. of Nelson, J., concurring and

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finding, at least according to the record quoted by the Ninth Circuit in its opinion. Rather, the district court found "it quite reasonable to expect that such publicity has been and will become even more pervasive". (A-61.)

dissenting)

A. The threat to a fair trial must be clear.

This Court in Nebraska Press noted that several of its prior decisions "demonstrate that pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial." 427 U.S. at 554. Rather, from the record, it must be "clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." (427 U.S. at 569.) In Nebraska Press, this Court found that the findings of the trial judge were inadequate because "[h]is conclusion as to the impact of such publicity on prospective jurors was of

necessity speculative, dealing as he was with factors unknown and unknowable." (Id. at 563.)

Similarly, in Chase v. Robson, 435 F.2d 1059 (7th Cir. 1059), the Seventh Circuit held that, "before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' [Citation.]" (Id. at 1061)

There is no record that the trial judge below made any specific findings to support his conclusion that defense attorney access to the media would pose a serious threat to a fair trial. Moreover, "his conclusion as to the impact of such publicity on prospective jurors" was

concededly speculative and thus not based on clear evidence.

B. Threats to the public's interest in the "integrity of the judicial process" posed by the likelihood of prejudicial publicity during trial cannot justify imposition of a prior restraint before trial, and may only be imposed once trial has commenced after other less drastic measures have been tried.

The Ninth Circuit held that a restraining order was necessary in the instant case because media coverage of defense statements, regardless of whether it seriously and imminently threatened the trial's fairness, and regardless of whether other measures could adequately safeguard actual fairness, nonetheless would injure the appearance of "the integrity of the judicial process". The majority's paramount concern was that a large amount of publicity would give rise to a "circus-like environment" and that such an environment would "threaten[] the

integrity of the judicial system." (A-63. See also A-60, quoting the order of the district court.) Justice Sneed, concurring, called this interest the "public's expectation that the trial will be fair", which is to be weighed against "the right of the accused to an impartial jury". (A-88, emphasis added.)

The court distinguished Nebraska Press and other precedents on the ground that they involved orders "aimed solely at curbing pretrial publicity." (A-62) The court rejected alternatives less onerous to First Amendment freedoms suggested in Nebraska Press -- including searching voir dire and emphatic jury instructions -- on the ground that such measures cannot alleviate the harm to the integrity of the judicial process caused by extrajudicial statements of trial participants. (A-73, A-75.)

While this Court in Nebraska Press did not address the potentially prejudicial impact of trial publicity, several commentators have opined that the Court would prohibit pretrial restraints on speech during trial, and would limit approval of trial restraints only after other measures had been tried and concretely shown to be indadequate.[10] That conclusion is presaged by the following passage in Sheppard v. Maxwell:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (384 U.S.

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10 See, e.g., Tribe, American Constitutional Law (1978), p. 627; Prettyman, "Nebraska Press Associaation v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?" 20 St. Louis L. J. 654, 658 (1976); Howard and Newman, "Fair Trial and Free Press: A Background Report," in House Committee Doc., 94th Cong., 2d Sess., 84 (1976).

at 363.)

Read in light of the disapproval of prior restraints in Nebraska Press, that passage suggests that attorney speech should only be regulated after censure, or perhaps contempt orders, have failed.[11] In a similar context, this Court has assumed that, "After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." Gannet

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[11] It should be kept in mind that what concerned the Ninth Circuit below was not the leakage of a single piece of prejudicial information that by itself could prejudice the trial; petitioners do not assert a right to release information prejudicial to a fair trial and unlikely to be admissible at trial. Rather the court below was worried about pervasive publicity that would create a circus-like environment. Thus, it is highly unlikely that the integrity of the judicial process would be irreparably damaged by a single contact between defense counsel and media. Should one contact, or several contacts, create a "circus-like" environment, it would be time enough to censure counsel, restore decorum, and eventually perhaps even impose restraints.

Co. v. DePasquale, 443 U.S. 368, 378 (1979)(concerning closure of pretrial suppression hearings). The correlative assumption, that information prejudicial to the government's interest in a fair trial can be kept from a jury by a variety of means, should be equally be valid.

One question here raised is whether restraints on attorney statements during trial may be justified pretrial on the basis of speculative assumptions (1) that pervasive publicity will continue, and (2) that no alternatives less onerous to First Amendment rights -- including change of venue, postponement of trial, searching jury voir dire, jury instructions, and sequestration -- will be effective in protecting the appearance of "judicial integrity". By deciding that question in the affirmative, the Ninth Circuit has created an exception to the Nebraska Press

rule large enough to swallow the rule, affording courts virtually unguided discretion to impose and sustain prior restraints.

A related question is whether the "integrity of the judicial process" or the "public's expectation in a fair trial" can ever justify a prior restraint on defense counsel speech. This Court recently noted that, "'Although litigants do not 'surrender their First Amendment rights at the courthouse door,' In re Halkin, 598 F.2d at 196, those rights may be subordinated to other interests that arise in this setting." Seattle Times Co. v. Rhinehart, ___ U.S. ___, 81 L.Ed.2d 17, 27 (1985). The Court refers to three of its decisions in which it subordinated First Amendment rights to a criminal defendant's right to a fair trial. It refers to no other criminal case in which some other

right justified a restraint on First Amendment freedoms.

C. Any conclusion that a prior restraint would be effective must be based on specific findings.

The Ninth Circuit's examination of the effectiveness of a restraining order was limited to the following three sentences:

> "Both the Supreme Court and this court have recognized the effectiveness of restraining orders against trial participants. [Citations.] Moreover, the district court found that extrajudicial statements by attorneys threatened to create extensive prejudicial publicity. Accordingly, we conclude that the district court properly found that its order would be effective." (A-65.)

Such a discussion, amounting to no more than a bare syllogism hardly satisfies the requirement that the circuit court is to "examine the evidence before the judge when the order was entered" (427 U.S. at) in applying the Nebraska Press

analysis. As noted by Justice Nelson, concurring and dissenting in the Ninth Circuit's opinion below, "Publicity in this case is likely to be widespread even if the district court restricts attorneys' comments to the press." (A-96) Moreover, because the restraint is directed primarily against defense counsel, it cannot be assumed that the balance of competing Sixth Amendment rights weighs in favor of a prior restraint, let alone that a prior restraint could be justified when the first amendment rights of petitioners, public and press are considered as well.

D. Any finding that less drastic measures would not be effective must be supported by specific findings.

The Ninth Circuit's opinion is astonishing in its wholesale rejection of measures short of prior restraint of defense attorney speech to assure trial fairness. The Ninth Circuit concluded

that the "objective . . . that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by outside influence, . . . can be obtained only if publicity created by private litigants is subject to reasonable restrictions. [¶] . . . Accordingly, the judiciary cannot escape the task of fixing the limits within which a defendant may attempt to create publicity." (A-58, emphasis added.)

That statement turns on its head the rulings by this Court in Nebraska Press and other cases that prior restraint of substantial First Amendment rights should be a measure of last resort to be imposed only after other measures have been shown to be inadequate. Any restriction imposed may not simply be "reasonable" but must by "strictly

necessary and narrowly drawn.

Moreover, the Ninth Circuit's reasoning places an unprecedented burden on defendants, the only "private litigants" in a criminal prosecution. Prevailing law, however, holds that, if anything, defendants and their counsel are entitled to greater leeway in recognition of the disadvantages under which they labor.

CONCLUSION

The Court should issue its writ of certiorari in order to consider the substantial questions herein presented.

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Respectfully submitted,

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